

1 Brad J. Moore, WSBA #21802  
2 STRITMATTER KESSLER WHELAN  
3 WITHEY COLUCCIO  
4 Attorneys for Plaintiffs  
5 200 Second Avenue West  
6 Seattle, Washington 98119-4204  
7 Telephone: (206) 448-1777  
8 Facsimile: (206) 728-2131  
9 Email: brad@stritmatter.com

10 [Additional Counsel Appear On Signature Page]

11 UNITED STATES DISTRICT COURT FOR THE  
12 EASTERN DISTRICT OF WASHINGTON

13 COMMUNITY ASSOCIATION FOR  
14 RESTORATION OF THE  
15 ENVIRONMENT, INC., a Washington  
16 non-profit corporation,

17 and

18 CENTER FOR FOOD SAFETY, INC., a  
19 Washington, D.C. non-profit corporation,

20 Plaintiffs,

v.

21 COW PALACE, LLC, a Washington  
22 limited liability company, THE  
23 DOLSEN COMPANIES, a Washington  
24 corporation, and THREE D  
25 PROPERTIES, LLC, a Washington  
26 limited liability company,

27 Defendants.

NO. 2:13-cv-03016-TOR

**PLAINTIFFS' RESPONSE TO  
DEFENDANT COW PALACE,  
LLC'S DAUBERT MOTION TO  
EXCLUDE TESTIMONY IN  
RELIANCE ON THE EPA  
REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE  
403**

28 PLAINTIFFS' RESPONSE TO DEFENDANT  
29 COW PALACE, LLC'S DAUBERT MOTION  
30 TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403

Case No. 2:13-cv-03016-TOR

# TABLE OF CONTENTS

## Page No.

I.	INTRODUCTION .....	1
II.	BACKGROUND .....	1
III.	ARGUMENT .....	2
A.	Cow Palace Failed to Identify the Testimony It Seeks to Exclude .....	4
B.	Mr. Maul's Opinions are Unreliable .....	5
C.	Cow Palace's Attempt to Bolster Mr. Maul's Opinions with Previously Undisclosed Hearsay Statements Is Improper .....	6
D.	The EPA Report Is a Reliable Source of Data .....	8
E.	The EPA Report is Not Unfairly Prejudicial .....	12
IV.	CONCLUSION .....	14

PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - i

Case No. 2:13-cv-03016-TOR

# TABLE OF AUTHORITIES

Page No.

## FEDERAL CASES

<i>Baltimore Gas &amp; Elec. Co. v. Natural Res. Def. Council</i> , 462. U.S. 87 (1983) .....	8
<i>Batista v. Supreme Alaska Seafood</i> , C04-1851RSL, 2005 WL 5980048 (W.D. Wash. Oct. 3, 2005) .....	13
<i>Chem. Mfrs. Ass’n v. EPA</i> , 919 F.2d 158 (D.C. Cir. 1990).....	9
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993) .....	3, 4, 10
<i>Dodge v. Cotter Corp.</i> , 328 F.3d 1212 (10th Cir. 2003) .....	10, 11
<i>Dura Automotive Sys of Ind., Inc. v. CTS Corp.</i> , 258 F.3d 609 (7th Cir. 2002) .....	7
<i>E.E.O.C. v. Farmer Bros. Co.</i> , 31 F.3d 891 (9th Cir. 1994) .....	13
<i>Envtl. Def. Ctr. v. U.S. EPA</i> , 344 F.3d 832 (9th Cir. 2003) .....	8
<i>Estate of Barabin v. AstenJohnson, Inc.</i> , 740 F.3d 457 (9th Cir. 2014) .....	4
<i>Indep. Tower of Wash. v. Wash.</i> , 350 F.3d 925 (9th Cir. 2003) .....	4

PLAINTIFFS’ RESPONSE TO DEFENDANT  
COW PALACE, LLC’S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - ii

Case No. 2:13-cv-03016-TOR

1	<i>Kumho Tire Co. v. Carmichael</i> ,	
2	526 U.S. 137 (1999) .....	3, 4
3	<i>Leese v. Lockheed Martin Corp.</i> ,	
4	6. F. Supp. 3d 546 (D.N.J. 2014).....	7
5	<i>Luttrell v. Novartis Pharm. Corp.</i> ,	
6	894 F. Supp. 2d 1324 (E.D. Wash. 2012) .....	8
7	<i>Ohio Valley Envtl. Coalition, Inc. v. Fola Coal Co.</i> ,	
8	No. 2:13-5006, 2014 WL 4925492 (S.D. W. Va. Sept. 30, 2014) .....	9

## FEDERAL RULES

9	Fed. R. Evid. 702 .....	2, 3, 8
10	Fed. R. Evid. 703 .....	3

PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - iii

Case No. 2:13-cv-03016-TOR

## I. INTRODUCTION

Plaintiffs respectfully request that the Court deny Cow Palace LLC's motion to exclude the EPA Report and expert testimony in reliance thereon (ECF No. 200). First, Cow Palace's motion fails to identify the expert testimony it seeks to exclude. Second, Cow Palace's motion relies primarily on the declaration of James Maul, whose opinions Plaintiffs have already asked the Court to exclude because they are based on insufficient facts and data (ECF No. 202). Third, Mr. Maul improperly attempts to bolster his own opinions with the previously undisclosed opinions of others who have never been identified as experts in this case. Many of Mr. Maul's opinions do little more than parrot those inadmissible hearsay statements. Fourth, the EPA Report is a reliable source of data. Finally, there is no reason to exclude the EPA Report under Federal Evidence Rule 403.

## II. BACKGROUND

In 2010, the United States Environmental Protection Agency conducted a study to investigate "the contribution from various land uses to the high nitrate levels in groundwater and residential drinking water." ECF No. 204-2 at ES-1. Plaintiffs' experts, including Dr. Byron Shaw, Dr. Robert Lawrence, and Mr.

PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 1

Case No. 2:13-cv-03016-TOR

David Erickson relied on the EPA Report, along with numerous other sources of data, to formulate opinions in this case. See ECF Nos. 223, 213, 212.

Cow Palace has moved to exclude the EPA Report and “expert testimony that relies on the [EPA Report].” ECF No. 200 at 1. Cow Palace’s motion is based primarily on Mr. James Maul’s critique of the EPA Report. ECF No. 204 ¶¶ 1–6. The expert reports and declarations offered by Dr. Shaw, Dr. Lawrence, and Mr. Erickson number in the hundreds of pages, and Cow Palace deposed each of these experts. See, e.g., ECF No. 198 (Expert Report of Dr. Byron Shaw); ECF No. 190-11 at 60–66 (Excerpts of the Deposition of Dr. Byron Shaw). Nevertheless, Cow Palace’s motion fails to identify what portions of Dr. Shaw’s, Dr. Lawrence’s,<sup>1</sup> or Mr. Erickson’s testimony it seeks to exclude. See generally ECF No. 200.

### III. ARGUMENT

Federal Rule of Evidence 702 governs the admissibility of expert witness testimony. It permits “a witness who is qualified by knowledge, skill, experience, training, or education” to offer opinion testimony if:

---

<sup>1</sup> Dr. Lawrence testified that the EPA Report is the type of report that he, as an expert, normally relies upon. ECF No. 205-3 (Lawrence Dep. at 65:21–66:1).

PLAINTIFFS’ RESPONSE TO DEFENDANT  
COW PALACE, LLC’S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 2

Case No. 2:13-cv-03016-TOR

1 (a) the expert's scientific, technical, or other specialized  
2 knowledge will help the trier of fact to understand the  
evidence or to determine a fact in issue;

3 (b) the testimony is based on sufficient facts or data;

4 (c) the testimony is the product of reliable principles and  
5 methods; and

6 (d) the expert has reliably applied the principles and  
methods to the facts of the case.

7 Under Rule 703, an expert may rely on the kinds of facts and data experts in the  
8 field would typically rely on, even if those facts or data would be otherwise  
9 inadmissible.

10 The trial court has wide discretion to act as a gatekeeper for the  
11 admissibility of expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137,  
12 151–52 (1999). The court first determines whether a witness is qualified as an  
13 expert, and then turns to the content of the expert's proffered testimony to assess  
14 whether it is both relevant and reliable. *Daubert v. Merrell Dow Pharm., Inc.*,  
15 509 U.S. 579, 589 (1993). In *Daubert*, the Supreme Court identified four factors  
16 that bear on the reliability of the expert's testimony, including: "1) whether a  
17 theory or technique can be tested; 2) whether it has been subjected to peer review  
18 and publication; 3) the known or potential error rate of the theory or technique;

19  
20 PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 3

Case No. 2:13-cv-03016-TOR

1 and 4) whether the theory or technique enjoys general acceptance within the  
 2 relevant scientific community.” *Estate of Barabin v. AstenJohnson, Inc.*, 740  
 3 F.3d 457, 463 (9th Cir. 2014) (en banc). These factors are not a “definitive  
 4 checklist or test.” *Daubert*, 509 U.S. at 593. Instead the reliability inquiry is  
 5 “flexible.” *Kumho Tire*, 526 U.S. at 141.

6 **A. Cow Palace Failed to Identify the Testimony It Seeks to Exclude**

7 Nowhere in Cow Palace’s seventeen-page motion does it identify the  
 8 expert testimony it seeks to exclude. ECF No. 200. Evidently, Cow Palace  
 9 expects the Court to comb through all of the expert evidence Plaintiffs’ have  
 10 presented, identify those portions that “rely” on the EPA Report, and then  
 11 evaluate whether that testimony should be excluded. The Court should decline to  
 12 do so. *See Indep. Tower of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003)  
 13 (“judges are not like pigs hunting for truffles buried in briefs”).

14 Rather than identify any particular expert testimony that it asserts is  
 15 unreliable, Cow Palace attacks the reliability of the EPA Report in general.  
 16 Plaintiffs respectfully submit that Rule 702 and *Daubert*, both of which  
 17 specifically apply to proffered *testimony*, are ill-suited for evaluation of a federal  
 18 agency’s report, and the Court should decline to use them for that purpose. In  
 19

20 PLAINTIFFS’ RESPONSE TO DEFENDANT  
 COW PALACE, LLC’S DAUBERT MOTION  
 TO EXCLUDE TESTIMONY IN RELIANCE  
 ON THE EPA REPORT AND TO EXCLUDE  
 EPA REPORT UNDER RULE 403 - 4

Case No. 2:13-cv-03016-TOR



1 addition, Cow Palace's attacks on the EPA Report are meritless and do not  
2 undermine the reliability of Plaintiffs' experts' testimony. This is especially true  
3 considering that Defendants' own expert, Dr. Stewart Melvin, explicitly relies  
4 upon data from the EPA Report in issuing his opinions in the related *Bosma*  
5 matter. See Declaration of Charles Tebbutt in support of Plaintiffs' Response to  
6 Defendant Cow Palace LLC's *Daubert* Motion, Ex. 1. It is contradictory for  
7 Defendants to attack the EPA Report in one instance while relying upon it for the  
8 basis of expert testimony in another.

9 **B. Mr. Maul's Opinions are Unreliable**

10 Cow Palace's critiques of the EPA Report are primarily offered by Mr.  
11 Maul. Mr. Maul's opinions, however, are unreliable and inadmissible under Rule  
12 702 because they are based on insufficient facts and data. Plaintiffs' motion to  
13 exclude Mr. Maul's testimony directs the Court to Mr. Maul's deposition  
14 testimony admitting that he failed to review available facts and data relevant to  
15 his criticisms of the EPA Report, including much of the data presented in the EPA  
16 Report. ECF No. 202 at 3–6; *see also* ECF No. 205-2 (Maul Dep. at 27:3–28:8;  
17 36:9–17; 37:4–7; 38:19–39:4; 44:24–45:3; 85:8–16; 97:10–21; 115:23–116:8;  
18 124:2–7). Those arguments are incorporated herein by reference. Plaintiffs

19  
20 PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 5

Case No. 2:13-cv-03016-TOR

1 respectfully request that the Court reject Mr. Maul's opinion that the EPA Report  
 2 "cannot be independently verified" and is "biased" (ECF No. 203-1 at 1) because  
 3 he made no attempt to independently verify it.

4 **C. Cow Palace's Attempt to Bolster Mr. Maul's Opinions with**  
 5 **Previously Undisclosed Hearsay Statements Is Improper**

6 Federal Rule of Civil Procedure 26(a)(2)(B)(i) requires a testifying expert  
 7 to provide a written report containing "a complete statement of all opinions the  
 8 witness will express and the basis and reasons for them." Mr. Maul's initial  
 9 expert report did not list any references or authorities relied on. *See generally*  
 10 ECF No. 203-1. Plaintiffs specifically asked Mr. Maul to identify any literature  
 11 relied on or other bases for his opinions. ECF No. 205-2 (Maul Dep. at 27:3–  
 12 32:17). Mr. Maul testified that the EPA Report and public comments on it  
 13 prepared by "Arcadis" and "Stuart Turner" were the "complete universe of  
 14 documents" he looked at in preparing his initial report. ECF No. 205-2 (Maul  
 15 Dep. at 32:8–17). His rebuttal report provides a list of additional documents  
 16 reviewed, but does not include any other public comments on the EPA Report.  
 17 ECF No. 203-2 at 14; ECF No. 205-2 (Maul Dep. at 32:18–33:5).

18 In support of Cow Palace's motion, Mr. Maul for the first time offers four  
 19 additional public comments on the EPA Report. *See* ECF No. 204 (Maul Decl.,

20 PLAINTIFFS' RESPONSE TO DEFENDANT  
 COW PALACE, LLC'S DAUBERT MOTION  
 TO EXCLUDE TESTIMONY IN RELIANCE  
 ON THE EPA REPORT AND TO EXCLUDE  
 EPA REPORT UNDER RULE 403 - 6

Case No. 2:13-cv-03016-TOR

1 Exs. C–F.) He characterizes these as comments from “authoritative and reputable  
2 experts” and claims to have reviewed them in preparing his declaration. ECF No.  
3 204 ¶ 4 (emphasis added). But none of the four individuals have been identified  
4 or qualified as an expert in this case. Moreover, Mr. Maul failed to cite their  
5 comments in either of his reports as required by Rule 26(a)(2)(B)(i), and at his  
6 deposition he testified that he reviewed only those comments prepared by  
7 “Arcadis” and “Stuart Turner.” Thus, Mr. Maul should be precluded from  
8 offering opinions based on the comments of the unidentified individuals.

9 Even if the four comments had been properly disclosed, Mr. Maul’s use of  
10 them is improper. Although an expert may rely on the opinions of another expert  
11 in formulating his own opinions, an expert may not simply “parrot” the ideas of  
12 other experts. *See Leese v. Lockheed Martin Corp.*, 6 F. Supp. 3d 546, 553  
13 (D.N.J. 2014); *see also Dura Automotive Sys of Ind., Inc. v. CTS Corp.*, 258 F.3d  
14 609, 614 (7th Cir. 2002) (“A scientist, however well credentialed he may be, is  
15 not permitted to be the mouthpiece of a scientist in a different specialty.”). Mr.  
16 Maul may not simply repeat the opinions of others—who are not hydrogeologists  
17 and have not been qualified as experts in this case—as his own. As his  
18 declaration reveals, however, that is precisely what he has attempted to do. *See*

19  
20 PLAINTIFFS’ RESPONSE TO DEFENDANT  
COW PALACE, LLC’S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 7

Case No. 2:13-cv-03016-TOR

ECF No. 204 ¶¶ 4, 13–23, 38 (vouching for the expertise of commentators from other fields and repeating their critiques of the EPA Report).

Further, expert testimony must help the trier of fact to “understand the evidence or determine a fact in issue.” Rule 702; *Luttrell v. Novartis Pharm. Corp.*, 894 F. Supp. 2d 1324, 1337 (E.D. Wash. 2012). Portions of Mr. Maul’s declaration merely repeat study limitations that the EPA itself identified in its report. *See* ECF No. 204 ¶¶ 24, 26, 28, 37. Cow Palace’s attempt to magnify those limitations by having its expert repeat them provide little assistance in understanding the evidence.

#### **D. The EPA Report Is a Reliable Source of Data**

Federal courts give deference to the scientific determinations of federal agencies when they make findings that fall within their special area of expertise. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983). The Ninth Circuit has explained that when EPA actions are based on scientific or technical analysis, those actions are entitled to deference. *See Env’tl. Def. Ctr. v. U.S. EPA*, 344 F.3d 832, 869 (9th Cir. 2003) (“We treat EPA’s decision with great deference because we are reviewing the agency’s technical analysis and judgments, based on an evaluation of complex scientific data within

PLAINTIFFS’ RESPONSE TO DEFENDANT  
COW PALACE, LLC’S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 8

Case No. 2:13-cv-03016-TOR

1 the agency's technical expertise); *see also Chem. Mfrs. Ass'n v. EPA*, 919 F.2d  
2 158, 167 (D.C. Cir. 1990) ("It is not the role of the courts to second-guess the  
3 scientific judgments of the EPA . . . ."). Federal courts have rejected attempts to  
4 challenge EPA reports on grounds very similar to those offered by Defendants  
5 here. *See Ohio Valley Envtl. Coalition, Inc. v. Fola Coal Co.*, No. 2:13-5006,  
6 2014 WL 4925492, at \*4–6 (S.D. W. Va. Sept. 30, 2014). In *Fola Coal*, the  
7 court dismissed defendant's challenges to the EPA's conclusions regarding causes  
8 of water contamination, which were largely based on study limitations identified  
9 within the report itself. *Id.* at \*5. There as here, "Plaintiffs relied on EPA's  
10 [study] as one among a number of scientific studies" supporting their causation  
11 arguments. *Id.* at \*4. Furthermore, the court gave the study deference. *Id.* at \*4–  
12 5.

13 The EPA study of nitrate contamination in the Yakima Valley is within the  
14 EPA's special area of expertise and is therefore entitled to deference from the  
15 Court. Cow Palace's attacks on the study should be rejected because they are  
16 mostly offered by an expert who (1) failed to consider numerous sources of  
17 available data before formulating his opinions, including data relied on by the  
18 EPA, (2) improperly attempts to bolster his own opinions with inadmissible  
19

20 PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 9

Case No. 2:13-cv-03016-TOR

1 hearsay that was not disclosed in either of his expert reports or during his  
2 deposition, and (3) largely repeats study limitations identified by the EPA itself.

3 The Court should also reject Cow Palace's attempt to use the four factors  
4 identified by the Supreme Court for evaluating scientific testimony as a  
5 "checklist" for evaluating the EPA Report. *Daubert*, 509 U.S. at 593.

6 Cow Palace argues that the EPA study used flawed techniques and  
7 methods. For example, it critiques the EPA's collection of water from residential  
8 wells not intended for groundwater monitoring. As noted, the Report discloses  
9 this limitation. ECF No. 204-2 at ES-3. More importantly, however, Plaintiffs'  
10 experts used the EPA well testing results as just one data set. They also rely on  
11 groundwater monitoring wells installed by the Dairies under the Administrative  
12 Order of Consent. *See, e.g.*, ECF No. 223 ¶¶ 54–64 (discussing sampling results  
13 from numerous wells).

14 Like its factual analysis, Cow Palace's legal analysis is flawed. For  
15 example, *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003), on which it  
16 relies, is distinguishable. In *Dodge*, the challenged expert had relied on a  
17 textbook that was more than thirty years old and established "worldwide average  
18 baselines of various substances." 328 F.3d at 1225. In sharp contrast, here the  
19

20 PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 10

Case No. 2:13-cv-03016-TOR

1 EPA used USGS information specific to the Yakima Valley, and collected data  
2 from the Valley, to reach conclusions about contamination in the Valley.  
3 Moreover, in *Dodge*, the Tenth Circuit concluded that the district court had  
4 acknowledged the textbook information was both old and worldwide rather than  
5 specific to the region but had failed to explain why the expert's testimony was  
6 reliable despite this limitation before admitting the testimony in a jury trial. *Id.* at  
7 1225–26. *Dodge* stands for the unremarkable position that a trial court faced with  
8 a challenge to the admissibility of expert testimony must make findings on the  
9 record regarding the reliability and relevance of the testimony before admitting it.  
10 *Id.* at 1226.

11 Cow Palace's arguments based on publication and peer review are  
12 unpersuasive. In *Daubert*, the Court explained that publication and peer review  
13 are not the "*sine qua non* of admissibility." 509 U.S. at 593. Despite this  
14 admonition, Cow Palace suggests that the EPA Report is unreliable because it "is  
15 not published in any scientific journal" (ECF No. 200 at 14). This argument  
16 ignores the fact that government reports—regardless of their validity—generally  
17 are not submitted for publication in scientific journals. They are instead subject  
18 to agency review and public comment. Moreover, the fact that individuals within  
19

20 PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 11

Case No. 2:13-cv-03016-TOR

1 the EPA, but not affiliated with the study, were recruited to review it does not  
2 mean their review should be wholly discounted as Cow Palace suggests (ECF No.  
3 200 at 14).

4 Cow Palace also attempts to make much of the fact that Dr. David  
5 Tarkalson asked not to be listed as a reviewer of the final report. Dr. Tarkalson's  
6 stated reason for his request not to be listed as a reviewer of the final report was  
7 that it includes information not included in the preliminary draft he reviewed.  
8 According to Cow Palace, this reveals Dr. Tarkalson's "opinion" of the EPA  
9 Report and "its trustworthiness." ECF No. 200 at 15. All his comment says,  
10 however, is that Dr. Tarkalson does not wish to be listed as a reviewer of  
11 information that he did not in fact review. He offers no opinion whatsoever about  
12 the validity of the study or report.

13 Cow Palace also argues that it is impossible to assign a known error rate to  
14 the EPA's findings. ECF No. 200 at 15. These assertions are unsupported by  
15 evidence or citation of any kind and should be evaluated accordingly.

16 **E. The EPA Report is Not Unfairly Prejudicial**

17 Cow Palace's argument that the EPA Report should be excluded under  
18 Evidence Rule 403 is groundless. As an initial matter, Rule 403 plays a limited  
19

20 PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 12

Case No. 2:13-cv-03016-TOR



1 role, if any, in a bench trial. *See E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 898  
 2 (9th Cir. 1994); *Batista v. Supreme Alaska Seafood*, C04-1851RSL, 2005 WL  
 3 5980048, at \*1 (W.D. Wash. Oct. 3, 2005) (finding Rule 403 “irrelevant” in a  
 4 bench trial). Second, as shown above, Cow Palace’s criticisms of the EPA Report  
 5 are unfounded. Third, Cow Palace has failed to explain what “unfair prejudice” it  
 6 will suffer from admission of the report. Cow Palace’s assertion that Plaintiffs’  
 7 experts used the EPA Report to “prove” that the Dairies are a source of nitrogen  
 8 contamination in groundwater (ECF No. 200 at 16) is inaccurate. To formulate  
 9 their opinions, Plaintiffs’ experts relied on the data included in the EPA Report,  
 10 along with numerous other sources of data and their expertise, all of which  
 11 confirm the findings made in the EPA Report.<sup>2</sup> If anything, Cow Palace’s  
 12 criticisms of the EPA Report go to the weight it should be afforded, not its  
 13 admissibility.<sup>3</sup> Nothing precludes Cow Palace from questioning the usefulness of  
 14 the EPA Report and its conclusions, or from any of its experts challenging the

---

15 <sup>2</sup> Cow Palace has not questioned the qualifications of any of Plaintiffs’ experts.

16 <sup>3</sup> In a footnote, Cow Palace reserves the right to challenge admission of the EPA  
 17 Report as hearsay. The EPA Report is an admissible public record under Federal  
 18 Rule of Evidence 803(8)(A)(iii).

1 report—provided the expert’s opinions on the subject meet the requirements of  
2 Rule 702 and *Daubert*.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Plaintiffs respectfully request that the Court  
5 deny Cow Palace’s motion to exclude testimony in reliance on the EPA Report  
6 and to exclude the EPA Report under Rule 403 (ECF No. 200).

7 RESPECTFULLY SUBMITTED AND DATED this 1st day of December,  
8 2014.

9 TERRELL MARSHALL DAUDT  
& WILLIE PLLC

10  
11 By: /s/ Beth E. Terrell, WSBA #26759  
12 Beth E. Terrell, WSBA #26759  
13 Toby J. Marshall, WSBA #32726  
14 Attorneys for Plaintiffs  
15 936 North 34th Street, Suite 300  
16 Seattle, Washington 98103  
17 Telephone: (206) 816-6603  
18 Facsimile: (206) 350-3528  
19 Email: bterrell@tmdwlaw.com  
20 Email: tmarshall@tmdwlaw.com

PLAINTIFFS’ RESPONSE TO DEFENDANT  
COW PALACE, LLC’S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 14

Case No. 2:13-cv-03016-TOR

Brad J. Moore, WSBA #21802  
Attorneys for Plaintiffs  
200 Second Avenue West  
Seattle, Washington 98119-4204  
Telephone: (206) 448-1777  
Facsimile: (206) 728-2131  
Email: brad@stritmatter.com

Charles M. Tebbutt, WSBA #47255  
Daniel C. Snyder, *Admitted Pro Hac Vice*  
Attorneys for Plaintiffs  
LAW OFFICES OF CHARLES  
M. TEBBUTT PC  
941 Lawrence Street  
Eugene, Oregon 97401  
Telephone: (541) 344-3505  
Facsimile: (541) 344-3516  
Email: charlie.tebbuttlaw@gmail.com  
Email: dan.tebbuttlaw@gmail.com

Elisabeth A. Holmes, *Admitted Pro Hac Vice*  
George Andreas Kimbrell  
Attorneys for Plaintiffs  
CENTER FOR FOOD SAFETY  
303 Sacramento Street, 2nd Floor  
San Francisco, California 94111  
Telephone: (415) 826-2770  
Facsimile: (415) 826-0507  
Email: eholmes@centerforfoodsafety.org  
Email: gkimbrell@centerforfoodsafety.org

Jessica L. Culpepper, *Admitted Pro Hac Vice*  
PUBLIC JUSTICE  
Attorneys for Plaintiffs  
1825 K Street Northwest, Suite 260  
Washington, DC 20006

PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 15

Case No. 2:13-cv-03016-TOR

Telephone: (202) 797-8600  
Facsimile: (202) 232-7203  
Email: jculpepper@publicjustice.net

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 16

Case No. 2:13-cv-03016-TOR

**TERRELL MARSHALL DAUDT & WILLIE PLLC**  
936 North 34th Street, Suite 300  
Seattle, Washington 98103-8869  
TEL. 206.816.6603 • FAX 206.350.3528  
www.tmdwlaw.com

CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on December 1, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Mathew Lane Harrington  
Olivia E. Gonzalez  
Attorneys for Defendant Cow Palace, LLC  
STOKES LAWRENCE PS  
1420 Fifth Avenue, Suite 3000  
Seattle, Washington 98101-2393  
Telephone: (206) 892-2123  
Email: mlh@stokeslaw.com  
Email: olivia.gonzalez@stokeslaw.com

Debora Kathleen Kristensen  
Jeffrey C. Fereday, *Admitted Pro Hac Vice*  
Preston N. Carter, *Admitted Pro Hac Vice*  
Attorneys for Defendant Cow Palace, LLC  
GIVENS PURSLEY LLP  
601 West Bannock  
P.O. Box 2720  
Boise, Idaho 83702  
Telephone: (208) 388-1200  
Facsimile: (208) 388-1300  
Email: dkk@givenspursley.com  
Email: jefffereday@givenspursley.com  
Email: prestoncarter@givenspursley.com

PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 17

Case No. 2:13-cv-03016-TOR

1           Brendan Victor Monahan  
2           Sean A. Russel  
3           Attorneys for Defendant Cow Palace, LLC  
4           STOKES LAWRENCE VELIKANJE MOORE & SHORE  
5           120 North Naches Avenue  
6           Yakima, Washington 98901-2757  
7           Telephone: (509) 853-3000  
8           Facsimile: (509) 895-0060  
9           Email: bvm@stokeslaw.com  
10          Email: sean.russel@stokeslaw.com

11           Ralph H. Palumbo, WSBA #4751  
12          Attorneys for The Dolsen Companies and Three D Properties, LLC  
13          SUMMIT LAW GROUP PLLC  
14          315 Fifth Avenue South, Suite 1000  
15          Seattle, Washington 98104-2682  
16          Telephone: (206) 676-7000  
17          Facsimile: (206) 676-7001  
18          Email: ralphp@summitlaw.com  
19          Email: cherylm@summitlaw.com

20          DATED this 1st day of December, 2014.

                                  TERRELL MARSHALL DAUDT  
                                  & WILLIE PLLC

14           By: /s/ Beth E. Terrell, WSBA #26759  
15           Beth E. Terrell, WSBA #26759  
16           Attorneys for the Plaintiffs  
17           936 North 34th Street, Suite 300  
18           Seattle, Washington 98103-8869  
19           Telephone: (206) 816-6603  
20           Facsimile: (206) 350-3528  
                  Email: bterrell@tmdwlaw.com

PLAINTIFFS' RESPONSE TO DEFENDANT  
COW PALACE, LLC'S DAUBERT MOTION  
TO EXCLUDE TESTIMONY IN RELIANCE  
ON THE EPA REPORT AND TO EXCLUDE  
EPA REPORT UNDER RULE 403 - 18

Case No. 2:13-cv-03016-TOR